

STATE OF MICHIGAN  
COURT OF APPEALS

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DEBRA LEA MILLER,

Plaintiff-Appellant,

v

JOHN THOMAS MILLER,

Defendant-Appellee.

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FOR PUBLICATION

November 30, 2004

9:00 a.m.

No. 242470

Wayne Circuit Court

LC No. 01-102843-DM

Official Reported Version

Before: Smolenski, P.J., and Saad and Kelly, JJ.

SAAD, J.

I. NATURE OF THE CASE

After unsuccessful efforts to settle this divorce case, the trial court entered a stipulated order for binding arbitration under Michigan's Domestic Relations Arbitration Act (DRAA).<sup>1</sup> Pursuant to the express terms of the trial court's order, the parties understood that this litigation would be arbitrated pursuant to the DRAA. Yet, rather than conducting a hearing, as that term is used by our Legislature,<sup>2</sup> the arbitrator instead attempted to settle the matter by mediation and

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<sup>1</sup> MCL 600.5070, *et seq.*

<sup>2</sup> "Black's Law Dictionary (Rev. 4th ed. 1968), defines a hearing as a '[p]roceeding of relative formality \* \* \* with definite issues of fact or of law to be tried \* \* \* much the same as a trial. . . .' In its popular sense, the term applies to any formal proceeding before a judge or other magistrate exercising a judicial function." *In re Marriage of Fine*, 116 Ill App 3d 875, 877; 452 NE2d 691 (1983).

"An arbitration implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hearings, to produce evidence and cross-examine that produced is implied when the matter to be decided is one of dispute and difference." *Omaha v Omaha Water Co*, 218 US 180, 194; 30 S Ct 615; 54 L Ed 991 (1910).

*The Random House Dictionary of the English Language: Second Edition Unabridged* defines "hearing" as "an instance or a session in which testimony and arguments are presented, esp. before an official, as a judge in a lawsuit."

In the context of parole violation hearings, this Court stated that "[t]he present statute does not spell out the right of the parolee to produce witnesses and proofs, but it does provide for

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ultimately issued what the arbitrator characterized as an "arbitral award" despite plaintiff's unsatisfied request for an arbitral hearing. The trial court affirmed the "arbitral award" over plaintiff's objection that she was never afforded the hearing guaranteed under the DRAA.

Accordingly, the sole issue on appeal is whether a domestic relations litigant is bound by an "arbitral award" if the arbitrator does not conduct a hearing, but instead meets with the parties ex parte in an effort to settle the case. Put another way, the question is whether the trial court should have vacated the "arbitral award" because the arbitrator failed to follow the unambiguous provisions of the DRAA.

Under the clear, mandatory language of the DRAA, litigants who give up the numerous rights afforded by general litigation in circuit court and instead choose binding arbitration to adjudicate their domestic relations claims are afforded basic, protective rights, the most important of which is a full and fair hearing. Here, this essential statutory right was neither waived nor provided and, therefore, we reverse the trial court's erroneous refusal to set aside the "arbitral award."

## II. FACTS AND PROCEEDINGS

Because our opinion deals only with the denial of plaintiff's statutory right to a hearing under the DRAA, we will forgo the usual recitation of facts regarding this divorce. Rather, the relevant facts here deal exclusively with the nature of the proceedings and the arbitration.

Plaintiff filed for divorce in January 2001, and the court attempted an in camera settlement conference with the parties on October 10, 2001. The court held a further settlement conference on October 26, 2001, and scheduled another settlement conference for November 30, 2001, informing the parties that if they could not reach a settlement by that date, the matter would be referred to arbitration. On December 4, 2001, the trial court entered a stipulated order for binding arbitration of all issues of the divorce.<sup>3</sup>

The "arbitration"<sup>4</sup> took place on February 20, 2002. The arbitrator separated the parties into two rooms and attempted to resolve certain contentious issues between the parties.

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a hearing. It is the opinion of this Court that a hearing necessarily comprehends the right of the accused to produce witnesses and proofs and to meet the witnesses who are produced against him. *We are of the opinion that any proceeding which does not provide for the production of witnesses and the introduction of evidence would not be a hearing at all.*" *Feazel v Dep't of Corrections*, 31 Mich App 425, 431; 188 NW2d 59 (1971) (emphasis added).

<sup>3</sup> The trial court's order stated, in relevant part, "[b]y approval of this Order for entry by the parties and their respective attorneys, the Court, pursuant to the provisions of [the DRAA], the Court [sic] refers all issues in this civil action to binding arbitration."

<sup>4</sup> We use the term "arbitration" in quotes here because, as we make clear in this opinion, we do not regard the arbitrator's efforts to settle this case to be the equivalent of arbitration. We find it difficult to find the right phraseology to describe what the arbitrator did here. Arbitration was ordered, but no arbitration took place in the traditional sense of the word because no hearing took place, no witnesses were sworn in, and no testimony was taken. Plaintiff sought additional

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According to plaintiff's testimony, the arbitrator explained that if the "arbitration" was not finished that day, he would use the initial session as a fact-finding or mediation session and, if this proved unsuccessful, he would schedule future dates for an arbitral hearing. According to plaintiff, the arbitrator said that if the initial procedure proved ineffective, he would proceed with formal arbitration with the usual introduction of testimony and documents through witnesses. At some point in the proceedings, the arbitrator advised plaintiff and her attorney that defendant had to leave to return to Colorado and that the arbitrator would attempt to resolve the matter without any further hearing dates. In response, plaintiff says that she requested additional arbitration sessions so that she could present her case and witnesses and cross-examine defendant. Despite this request, the arbitrator did not schedule an arbitral hearing. Instead, on April 1, 2002, the arbitrator issued a proposed award without scheduling any further sessions and without providing the parties the opportunity for direct or cross-examination or the introduction of exhibits. Upon receiving the proposed award, plaintiff's counsel again requested additional hearing dates to present plaintiff's case. Among many other substantive complaints that plaintiff had regarding the proposed award, plaintiff vigorously complained that the arbitrator totally failed to comply with the DRAA by his failure to hold a hearing. On April 10, 2002, the arbitrator presented a final, binding "arbitral award" that the arbitrator said reflected many of the substantive objections outlined by plaintiff, except the objection that plaintiff was never afforded her statutory right to a hearing.

On April 19, 2002, plaintiff filed a motion to set aside the "arbitral award" and to appoint a new arbitrator. Plaintiff asserted, correctly, that the arbitrator failed to meet with the parties in the manner and for the purpose specified by the DRAA,<sup>5</sup> and failed to conduct a hearing as required by the act.<sup>6</sup> Plaintiff also maintained, again correctly, that the matter proceeded to arbitration without the statutorily mandated stipulation agreement for binding arbitration. MCL 600.5071. On May 24, 2002, the trial court heard arguments and rejected plaintiff's objections and entered a judgment of divorce that incorporated the "arbitral award." On June 21, 2002, the trial court entered an order denying plaintiff's motion to set aside the "arbitral award." This appeal followed and we reverse the trial court's erroneous denial of plaintiff's motion to set aside the award for the reasons stated below.

### III. ANALYSIS

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"sessions" because she wanted the chance to present her case in the manner commonly defined as an arbitration. The arbitrator's efforts at settlement mimicked the procedure known as mediation, but he nonetheless characterized the "proceeding" in his "award" as a "hearing." It is little wonder that plaintiff, who simply asked to present her case, found it difficult to define, but nonetheless understandably objected to, what transpired on the day she expected to present her case to an arbitrator.

<sup>5</sup> MCL 600.5076.

<sup>6</sup> MCL 600.5074(1) provides: "An arbitrator appointed under this chapter *shall hear* and make an award on each issue submitted for arbitration . . . ." (Emphasis added.)

For many years, Michigan's statutes and court rules provided rules for arbitration in general,<sup>7</sup> but not specifically for domestic relations matters. And, although this Court approved the use of arbitration in domestic relations matters, our case law did not provide guidelines for these arbitrations. See *Dick v Dick*, 210 Mich App 576; 534 NW2d 185 (1995).

The Legislature noted the absence of procedures and safeguards for fair arbitral hearings in domestic relations matters and, to encourage domestic relations litigants to give up their litigation rights and choose binding arbitration, responded by enacting the DRAA.<sup>8</sup>

### *Requirements for Binding Arbitration Under the DRAA*

The DRAA provides numerous due process or procedural protections to a domestic relations party who agrees to binding arbitration. The DRAA provides that the parties who agree to binding arbitration should do so "by a signed agreement that specifically provides for an award" regarding delineated issues. MCL 600.5071. Further, the DRAA specifically prohibits a court from ordering a domestic relations party to participate in arbitration "unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language" of the salient features of arbitration.<sup>9</sup>

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<sup>7</sup> See MCL 600.5001 *et seq.* (arbitration statute); MCR 3.602 (court rule governing arbitration).

<sup>8</sup> A legislative analysis of the DRAA as enrolled states:

[T]he RJA does not specifically address arbitration in domestic relations matters, and so provides no guidelines or standards for such arbitration. Michigan court rule [3.216(A)(3)] allows a court to order arbitration, upon stipulation of the parties, but also doesn't provide standards or guidelines for such arbitration. . . .

. . . Because of crowded court dockets and the fact that criminal cases must take precedence over other matters, the parties (and their families) in a domestic relations dispute may find themselves waiting a long time before they have a hearing to resolve the dispute and as a result often will resort to alternative dispute resolution methods.

The bills would address all of these problems. Standards and guidelines would provide uniformity to the process and safeguards that are essential to fair hearings. [House Legislative Analysis, HB 4552 and 4615, January 5, 2001, p 5.]

<sup>9</sup> MCL 600.5072(1) provides:

The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:

(a) Arbitration is voluntary.

(b) Arbitration is binding and the right of appeal is limited.

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Importantly, MCL 600.5072(1)(e) provides that "[t]he arbitrator's powers and duties are delineated in a *written arbitration agreement* that all parties must sign before arbitration commences." (Emphasis added.) MCL 600.5073 provides for the qualifications and appointment of an arbitrator.

Most importantly to our holding, in language that specifies that a domestic relations litigant who gives up her right to litigate her matter in court shall have a full and fair arbitral hearing, the DRAA unambiguously provides that

[a]n arbitrator appointed under this chapter *shall hear* and make an award on each issue submitted for arbitration under the arbitration agreement subject to the provisions of the agreement. [MCL 600.5074(1) (emphasis added).]

With respect to defendant's contention and the trial court's erroneous holding that ex parte meetings with the parties satisfy this statutory mandate for a "hearing," we hold that the DRAA is clear and unambiguous in requiring a hearing. *Id.* A party who gives up her right to litigate her case in court, including substantial discovery and appellate rights, in exchange for binding arbitration may not be deprived of her right to present her case before a neutral arbitrator. To underscore this clear mandate, the DRAA requires the arbitrator to meet with the parties to

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(c) Arbitration is not recommended for cases involving domestic violence.

(d) Arbitration may not be appropriate in all cases.

(e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.

(f) During arbitration, the arbitrator has the power to decide each issue assigned to arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues.

(g) The party may consult with an attorney before entering into the arbitration process or may choose to be represented by an attorney throughout the entire process.

(h) If the party cannot afford an attorney, the party may wish to seek free legal services, which may or may not be available.

(i) A party to arbitration will be responsible, either solely or jointly with other parties, to pay for the cost of the arbitration, including fees for the arbitrator's services. In comparison, a party does not pay for the court to hear and decide an issue, except for payment of filing and other court fees prescribed by statute or court rule for which the party is responsible regardless of the use of arbitration.

discuss the scope of the issues, the date, time and place of the *hearing*, including witnesses and experts who may testify, and a schedule for exchange of expert reports or summary of expert testimony.<sup>10</sup> By this provision, the Legislature clearly expressed its intent that the arbitrator and the parties would meet and prepare thoroughly for a full and fair hearing. Indeed, the meeting required by MCL 600.5076 serves as the functional equivalent of a "pretrial conference" so the parties can plan to present their case at the arbitral hearing. For us to hold that the DRAA requires this preparatory meeting, but not the hearing itself, would do an injustice to the legislative scheme and the parties. Further, in reviewing the grounds for vacation of an arbitral award under the DRAA, we note, importantly, that the statute requires a court to vacate an award when

[t]he arbitrator refused to postpone the *hearing* on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise *conducted the hearing* to prejudice substantially a party's right.<sup>11</sup>

In the face of this strong legislative direction to our judiciary to ensure fair hearings for domestic relations parties who choose arbitration, a trial court simply must overturn any award in which the arbitrator has denied either party the statutory right to a hearing. It would be contrary to the letter and spirit of the DRAA to mandate that courts vacate arbitral awards when arbitrators unfairly denied parties' requests for adjournment, unfairly refused to hear evidence, or unfairly conducted the hearing, but to nonetheless affirm awards when parties were denied their

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<sup>10</sup> MCL 600.5076(1) provides:

As soon as practicable after the appointment of the arbitrator, the parties and attorneys shall meet with the arbitrator to consider all of the following:

- (a) Scope of the issues submitted.
- (b) Date, time, and *place of the hearing*.
- (c) Witnesses, including experts, *who may testify*.
- (d) Schedule for exchange of expert reports or summary of expert testimony.
- (e) Subject to subsection (2), exhibits, documents, or other information each party considers applicable and material to the case and a schedule for production or exchange of the information. If a party knew or reasonably should have known about the existence of information the party is required to produce, that party waives objection to producing that information if the party does not object before the *hearing*. [Emphasis added.]

<sup>11</sup> MCL 600.5081(2)(d) (emphasis added).

right to any hearing whatsoever. Indeed, to do so would be contrary to the plain language of the statute and contrary to the interests of parties in domestic relations litigation.

To keep faith with the Legislature's intent, courts and arbitrators must proceed in full compliance with the DRAA.<sup>12</sup> Efforts at settlement, mediation, or "shuttle diplomacy" simply will not satisfy the plain language of the statute.<sup>13</sup> Under the DRAA, nothing short of a full and fair hearing will suffice.<sup>14</sup> To satisfy this express language<sup>15</sup> and the purpose of the DRAA,

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<sup>12</sup> Here, the court did not require the statutory stipulation agreement for binding arbitration. Instead, the court entered an order that simply quoted from the statute and ruled that this was sufficient. The DRAA requires that the parties sign an agreement as a protection to the parties and a trial court must adhere to this provision. Because our holding addresses the need for a hearing, we need not address whether the lack of this stipulation requires reversal or vacation of the "arbitral award," and we decline to address that question here. However, we note that this Court has held, in another context, that a stipulated order that does not conform to the DRAA's requirements is void. *Harvey v Harvey*, 257 Mich App 278, 291; 668 NW2d 187 (2003), aff'd 470 Mich 186; 680 NW2d 835 (2004).

<sup>13</sup> To hold otherwise here would be tantamount to conceding that a "hearing" can be defined by any trial court or arbitrator as something other than a hearing. A word that has clear meaning must be given its clear meaning instead of whatever meaning one chooses to give it:

"I don't know what you mean by 'glory,'" Alice said.

Humpty Dumpty smiled contemptuously. "Of course you don't—till I tell you. I meant 'there's a nice knock-down argument for you!'"

"But 'glory' doesn't mean 'a nice knock-down argument,'" Alice objected.

"When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all." [Carroll, *Through the Looking Glass and What Alice Found There*, in *The Annotated Alice* (New York: Bromhill House, 1960), pp 268-269.]

<sup>14</sup> Our courts have historically required a full and fair hearing as a precondition to binding arbitration. See *Renny v Port Huron Hosp*, 427 Mich 415, 437; 398 NW2d 327 (1986) (arbitration of employment contract claims), and *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 161; 596 NW2d 208 (1999) (arbitration of statutory employment discrimination claims).

<sup>15</sup> "An arbitrator appointed under this chapter *shall hear* and make an award on each issue submitted for arbitration under the arbitration agreement subject to the provisions of the agreement." MCL 600.5074(1) (emphasis added).

absent a knowing and voluntary waiver of the right to a hearing, courts and arbitrators must ensure full compliance with the protections of the DRAA.<sup>16</sup>

#### IV. RESPONSE TO THE DISSENT

The fundamental difference between our interpretation of the DRAA and that of the dissent is the dissent's willingness, but our refusal, to accept de facto mediation as satisfying the DRAA's requirement of a fair hearing. Here, the arbitrator in essence conducted what is commonly understood as domestic relations mediation under MCR 3.216 by placing the parties in separate rooms and attempting to settle the case through this "shuttle diplomacy." Of course, in mediation, the parties are not bound by this process and thus our Supreme Court does not require a hearing under MCR 3.216. That is, if the mediator proposes a settlement, the parties may reject the mediator's proposed settlement agreement. This graphically underscores the difference between mediation, which occurred here, and binding arbitration, in which the parties' lives may be altered substantially and forever because of the binding nature of an arbitral award and the limited right of appeal from arbitral awards. Furthermore, recognizing that important rights are determined with finality in arbitrations, this Court has held that a basic prerequisite to a binding arbitral award is a full and fair hearing.<sup>17</sup>

The dissent misapprehends the Legislature's intent and ignores the plain language of the statute and, further, misapprehends and misstates our very precise holding. We need not, and thus do not, as the Legislature did not, define with particularity the precise dimensions of a full and fair hearing. The Legislature may, of course, use terms of art such as "hearing," "witness,"

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<sup>16</sup> If a domestic relations party is to be held to have waived any of her enumerated statutory rights and protections afforded to her by the Legislature, the waiver must be clear, knowing and voluntary. This Court has noted in other contexts, with respect to domestic relations, that parties may waive statutory rights, but any waiver should be clear and unambiguous. *Staple v Staple*, 241 Mich App 562, 568; 616 NW2d 219 (2000). Here, there is no evidence of plaintiff's knowing and voluntary waiver of her rights to a full and fair hearing. The dissent cannot seriously contend that plaintiff clearly and voluntarily waived her right to a hearing. Indeed, plaintiff and her counsel repeatedly asked for a hearing and have contended at every step of the proceeding that they desired a hearing in the sense that this term is commonly understood—the right to present evidence and to challenge the evidence presented by the other side.

At a hearing on June 28, 2002, plaintiff's counsel stated, "As to Mr. Tucker [the arbitrator] in our response, one of the things we continually urged Mr. Tucker to do was to hold arbitration hearings where we could put people under oath and present evidence. He was adamant, would not allow my client to testify, would not allow me to cross examine the defendant, would not allow me to call witnesses." At an earlier hearing, plaintiff's counsel told the trial court that "Mr. Tucker spent very little time with us that day. He told my client and I we would be coming back to future sessions. In the afternoon he said Mr. Miller had to go back to Colorado that day, so we wouldn't be able to continue the next day. When I left that day, I was to contact him in two or three days in an attempt to schedule continued hearings. In summary, he didn't comply with either the order of the Court as arbitration or the statute."

<sup>17</sup> See *Renny, supra*; *Rembert, supra*.

and "testify," knowing that decades or indeed centuries of legal practice give meaning to these words, which will be honored by the judiciary.<sup>18</sup> Indeed, the Legislature need not define every word used in a statute that addresses areas of professional practice or a learned profession. We do not, nor should we, seek here to define with precision and finality what each term, such as "hearing," means. Yet, neither are we limited from making a prudential judgment that what occurred here fails, woefully, to satisfy even the most minimal concept of a hearing. Indeed, when faced with these facts, it is incumbent upon us to rule that something that fails to even remotely resemble a hearing is clearly less than what the Legislature contemplated when it called for arbitral hearings as a predicate to binding arbitral awards. It is keeping faith with the legislative intent, not "paternalistic,"<sup>19</sup> to hold as we do that the Legislature would not tolerate a domestic relations litigant being bound by an arbitral award without the basic right of having presented her case and having contested her opponent's case in a hearing. Secret meetings behind closed doors, followed by binding "arbitral awards," are patently unacceptable. Were we to hold, as defendant and the dissent urge, that what transpired here satisfies the legislative mandate for a full and fair hearing, we would repudiate the numerous provisions of the DRAA that the Legislature promulgated as "safeguards that are essentials to fair hearings."<sup>20</sup> And, were we to adopt the view of the dissent, litigants would be understandably reluctant to place their fate in the hands of a process that afforded little or no right to be heard in any meaningful sense. As

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<sup>18</sup> As a guideline to statutory interpretation, the United States Supreme Court has stated:

"[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." [*Immigration & Naturalization Service v St Cyr*, 533 US 289, 312 n 35; 121 S Ct 2271; 150 L Ed 2d 347 (2001), quoting *Morissette v United States*, 342 US 246, 263; 72 S Ct 240; 96 L Ed 288 (1952).]

<sup>19</sup> *Post* at \_\_\_\_.

<sup>20</sup> As we observed in n 8, a legislative analysis of the DRAA as enrolled states:

[T]he RJA does not specifically address arbitration in domestic relations matters, and so provides no guidelines or standards for such arbitration. Michigan court rule [3.216(A)(3)] allows a court to order arbitration, upon stipulation of the parties, but also doesn't provide standards or guidelines for such arbitration. . . .

. . . Because of crowded court dockets and the fact that criminal cases must take precedence over other matters, the parties (and their families) in a domestic relations dispute may find themselves waiting a long time before they have a hearing to resolve the dispute and as a result often will resort to alternative dispute resolution methods.

The bills would address all of these problems. Standards and guidelines would provide uniformity to the process and safeguards that are essential to fair hearings. [House Legislative Analysis, HB 4552 and 4615, January 5, 2001, p 5.]

we read the statute, what transpired here falls short of what the Legislature intended and what the plain language of the statute requires. It is not a process that we should or will endorse.

## V. CONCLUSION

The DRAA's purpose of encouraging litigants to opt for binding arbitration and forgo litigation to reduce dockets and provide expeditious, inexpensive, and fair alternatives to protracted litigation in domestic relations matters would be severely undermined, as would confidence in the statutory scheme, were we to permit an arbitrator, as here, to arbitrarily substitute ex parte meetings with the parties for the statutory guarantee of a full and fair hearing.

Accordingly, we hold that the DRAA requires, among other important protections afforded to a domestic relations party, a full and fair hearing before a neutral arbitrator. Therefore, we reverse the trial court's judgment of divorce that incorporated the "arbitral award," vacate the "arbitral award," and remand to the trial court for proceedings consistent with our opinion. We do not retain jurisdiction.

Smolenski, P.J., concurred.

/s/ Henry William Saad

/s/ Michael R. Smolenski